STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE ADMINISTRATIVE COURT
COUNTY OF CABARRUS	11-EDC-09919

Student, by and through his parents, *Mother* and *Father*, Petitioners, v. Cabarrus County Board of Education, Respondent.	)	**FINAL DECISION – ORDER OF DISMISSAL**

THE ABOVE-ENTITLED MATTER was heard before the undersigned Administrative Law Judge Selina M. Brooks on January 30, 31, and February 1, 2012 in the Cabarrus County Courthouse. At the close of Petitioners' evidence, Respondent moved for dismissal pursuant to N.C. Rule of Civil Procedure 41(b) on the ground that upon the facts and the law the Petitioners have shown no right to relief.

APPEARANCES

For the Petitioners:

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Durham, North Carolina 27705

For the Respondent:

Mark P. Henriques, Esquire
Sarah Motley Stone, Esquire
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Charlotte, North Carolina 28202-6037

WITNESSES

For Petitioners:
Father
Mother
EC Director
M.K.
B.L.

P.C.
B.M.
A.K.
Dr. L.P.
P.T.

EXHIBITS

For Petitioners: Exhibits 1 to 55

STIPULATIONS

1. Pursuant to the Order on Final Pre-Trial Conference approved and ordered by the undersigned on January 30, 2012, the parties stipulated to the following facts:

(a) It is stipulated that all parties are properly before the Court, and that the Court has jurisdiction of the parties and of the subject matter; that all parties have been correctly designated; and there is no question as to misjoinder or nonjoinder of parties.

(b) *Student* currently attends XX Elementary School. He is in the third grade, and is placed in a self-contained classroom for students with Autism.

(c) *Student* is a nine year old boy. *Student* lives with his mother and father in Cabarrus County, North Carolina.

(d) At all times relevant to this action, Petitioners were domiciled within the Cabarrus County Board of Education's territorial jurisdiction.

(e) *Student* has been evaluated as having autism. By reason of his autism, *Student* needs "special education" and "related services," as those terms are defined in 34 CFR §§ 300.39 and 300.34, respectively.

(f) Therefore, *Student* is a "child with a disability," as that phrase is defined by the Individuals with Disabilities Education Act ("IDEA.") and 34 CFR § 300.8.

(g) *Student* is served pursuant to a written Individual Education Program ("IEP").

(h) *Mother* and *Father* have participated in all meetings of *Student*'s IEP Team to which they have been properly invited.

2. The parties also stipulated at the start of the hearing that the relevant time period for the issues at dispute in the hearing is from June 2009 through January 2012.

ISSUES

The parties were unable to agree to a single set of issues. Petitioners contended that the

contested issues to be tried by this Court were:

1. Did Respondent deprive *Student* of a FAPE on substantive grounds?

2. Did Respondent violate IDEA's procedural requirements?

3. Did any of those procedural inadequacies:

a. impede *Student*'s right to a FAPE;

b. substantially impede *Student*'s parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to *Student*; or

c. deprive *Student* of educational benefit?

Respondent contended that the contested issues to be tried by this Court are:

1. Whether *Student*'s IEP for the 2009/2010 school year was reasonably calculated to enable a *Student* to receive an educational benefit and make educational progress.

2. Whether *Student* received an educational benefit and makes educational progress under his 2009/2010 school year IEP.

3. Whether pursuant to NC 1504-1.3(b)(2), the January 2012 Occupational Therapy Re-Evaluation for *Student* was appropriate and therefore CCBOE is not required to provide Petitioners with an independent educational evaluation at public expense.[1]

For the purposes of this Final Decision, Petitioners' proposed contested issues are accepted.

STANDARD OF REVIEW

The North Carolina Rules of Civil Procedure provide, in pertinent part:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff[.]

N.C. Gen. Stat. § 1A-1, Rule 41(b).

[1] At the conclusion of the hearing, Petitioners withdrew their request for an Independent Educational Evaluation for Occupational Therapy. As such, Respondent's third issue is hereby deemed moot.

"When a motion to dismiss pursuant to 41(b) is made, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him. He passes upon the credibility of the witnesses and the weight to be given to their testimony." *Dealers Specialties, Inc. v. Neighborhood Housing Servs., Inc.*, 305 N.C. 633, 640, 291 S.E.2d 137, 141 (1982). Moreover, in determining the sufficiency of the evidence when ruling on a motion to dismiss made under Rule 41(b), the judge is not bound to make inferences in favor of the plaintiff's (Petitioner's) evidence. *Id.* at 638, 291 S.E.2d at 140. Where the plaintiff's (Petitioner's) evidence shows no right to relief, the defendant (Respondent) is entitled to have its motion to dismiss granted. *Employers Mut. Cas. Co. v. Griffin*, 46 N.C. App. 826, 827, 266 S.E.2d 18, 19 (1980).

Based upon careful consideration of the sworn testimony of the witnesses presented at this hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding and after hearing arguments of both counsel, the undersigned makes the following findings of fact and conclusions of law in accordance with N.C. Rules of Civil Procedure 41(b) and 52(a). In making these findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate facts for judging credibility, including, but not limited to, the demeanor of the witnesses, any interest, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified, whether the witness is reasonable, and whether the testimony is consistent with all other believable evidence in this case.

FINDINGS OF FACT

1. A Petition for Contested Case Hearing was filed and accepted by the Office of Administrative Hearings as Case Number 10 EDC 3475 in June 2010 (the "2010 Action"). Petitioners filed a voluntary dismissal without prejudice of the 2010 Action on November 22, 2010. On July 29, 2011, a Petition for Contested Case Hearing was filed and accepted by the Office of Administrative Hearings as Case No. 11 EDC 09919. This is the action currently before the Court.

2. Minor Petitioner *Student* is a nine-year-old special education student enrolled in Cabarrus County Schools. *Student* receives special education services as a child with autism.

3. The Court received no designated expert testimony.

4. For the period in question, June 2009 to January 2012, *Student* has been served pursuant to written IEPs. (Petitioners' Exs. 43, 44, 51, 52, 53).

5. *Father* and *Mother*, parents of the minor Petitioner, have been invited to participate and have participated in numerous IEP team meetings to formulate and review these IEPs. They have brought outside consultants to the meetings and the IEP team has properly considered the information from these consultants. They have met with *Student*'s teachers and have had extensive communication with the school.

6. There was no evidence presented that any of *Student*'s IEPs were procedurally

deficient or not reasonably calculated to provide meaningful educational benefit.

7. The Court received no testimony or evidence that any aspect of *Student*'s IEPs had not been implemented.

8. Testimony from *Student*'s classroom teachers, Ms. B.L. and Ms. A.K, indicated that *Student* has made some progress on the goals in his IEPs. Ms. A.K. reviewed Petitioners' Exhibit 43 (2010-2011 IEP) and Exhibit 44 (2011-2012 IEP) and specifically identified a number of goals in these IEPs that *Student* has mastered. Ms. B.L. and Ms. A.K.'s testimony was credible.

9. *Student* has an IEP and is receiving meaningful educational benefit from his IEP. *Student* has progressed under the IEPs that have been in place since June 2009.

10. Dr. L.P. testified that *Student*'s achievement level, as measured by testing, improved between 2009 and 2011.

11. *Student*'s IEP also contains behavior goals. Credible testimony was received that several functional behavioral assessments had been conducted for *Student*, most recently including the input of *Dr. L.P.*. From these functional behavioral assessments, *Student* has been served pursuant to behavior intervention plans.

12. Classroom staff and *Dr. L.P.* agreed that *Student*'s behavior has improved over time. Specifically, the amount of time "compliant" versus "noncompliant" has increased and the frequency of incidents of physical aggression has decreased. The classroom staff and *Dr. L.P.*'s testimony regarding the behavior data was credible.

13. The Court received testimony that there is on-going training in *Student*'s classroom for the classroom staff. Respondent provides an ABA consultant, an autism program support specialist, and a behavior consultant to work with the classroom staff.

14. The Court received no testimony or evidence that *Student* is not being educated in the least restrictive environment.

15. The Court received no testimony or evidence that *Mother* or *Father* have been denied an opportunity to participate in the development of *Student*'s IEPs.

16. The Court received no testimony or evidence that any evaluation of *Student* was conducted improperly.

17. The Court received no testimony or evidence that Respondent violated IDEA's procedural requirements.

18. The Court received no testimony or evidence that *Student* has been deprived of FAPE on substantive grounds.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and the preponderance of the evidence, the Undersigned makes the following Conclusions of Law:

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Sections 150B and 115C of the North Carolina General Statutes and the Individuals with Disabilities Improvement Act, 20 U.S.C. § 1400 *et. seq*. and implementing regulations (34 C.F.R. Part 300).

2. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) and 26 N.C.A.C. 03.0101 and 26 N.C.A.C. 03.0115, the undersigned has the authority to render dismissal on the merits.

3. A dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) is properly granted "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." N.C. Gen. Stat. § 1A-1, Rule 41(b). "The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence." *Id.*

4. The function of a judge on a motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 41(b) is to evaluate the evidence without any limitations as to inferences in favor of the plaintiff. *Holthusen v. Holthusen*, 79 N.C. App. 618, 622, 339 S.E.2d 823, 825 (1986).

5. Under IDEA, the burden of proof in an administrative hearing is properly placed on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 51 (2005). In this contested case, Petitioners are the parties seeking relief and therefore bear the burden of proof for the remedies sought. Petitioners have the burden of persuasion in this case to show that Respondent has failed to provide *Student* with a free appropriate public education ("FAPE"). Petitioners carry that burden by a greater weight or preponderance of the evidence. Black's Law Dictionary defines "preponderance" as "something more than weight; it denotes a superiority of weight, or outweighing."

6. To determine if FAPE has been provided, the Court is to determine if the school has complied with the procedures set forth in the IDEA and if the IEP is reasonably calculated to allow the child to receive educational benefit. *Bd. of Educ. Of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982).

7. A procedural violation only rises to the level of a denial of FAPE if it results in an IEP that did not provide educational benefit. *M.M. v. Sch. Dist. of Greenville County*, 303 F.3d 523, 533 (4th Cir. 2002).

8. The IDEA defines FAPE as an education that provides the handicapped child with personalized instruction and sufficient support services to permit the child to benefit from the

instruction. *Rowley*, 458 U.S. at 203; *In re Conklin*, 946 F.2d 306, 313 (4th Cir. 1991); *Harrell v. Wilson County Schools*, 58 N.C. App. 260, 265, 293 S.E.2d 687, 690 (1982).

9. IDEA establishes a "basic floor of opportunity." *Avjiam v. Weast*, 242 Fed. Appx 77, 82 (4th Cir. 2007). Once FAPE is offered, the school district need not offer additional educational services. *Id.* There is no need to furnish "every special service necessary to maximize each handicapped child's potential." *MM*, 303 F.3d at 526-27 (citing *Hartmann v. Loudon County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997); *Rowley*, 458 U.S. at 199-200).

10. The law does not require the development of a "utopian educational program for handicapped students any more than the public schools are required to provide utopian education programs for non-handicapped students." *See Harrell*, 58 N.C. App. at 265, 293 S.E.2d at 690-91.

11. The Supreme Court has cautioned that "courts must be careful to avoid imposing their view of preferable educational methods…" and instead defer to the opinions of trained educators. *Rowley*, 458 U.S. at 207. "[A court] should be reluctant . . . to second-guess the judgment of education professionals," as reflected in their development of a proposed IEP. *M.M.*, 303 F.3d at 532. Indeed, a reviewing court is "obliged to defer to educators' decisions as long as an IEP provided the child the basic floor of opportunity that access to special education and related services provides." *Id.* (internal quotation marks omitted). The Court's role in reviewing the administrative proceeding concerning IDEA "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities they review." *Rowley*, 458 U.S. at 206, *accord Hartmann*, 118 F.3d at 999.

12. A school district can use "its normal procedures for dealing with children who are endangering themselves or others," such as "timeouts, detention, or the restriction of privileges," or suspension. *Honig v. Doe*, 484 U.S. 305, 325-26 (1988).

13. A teacher's use of a behavior strategies that the hearing officer found to be an "improper educational tactic" did not deny the student FAPE. *BV v. Education Dep't of Hawaii*, 451 F. Supp. 2d 1113, 1124 (D. Haw. 2005), *aff'd* 514 F.3d 1384 (9th Cir. 2008).

14. The parent has a right to participate in the formulation of the IEP. He or she does not have the right to express a veto power over any of the decisions contained therein. *See, e.g., AW v. Fairfax County Sch. Bd.*, 372 F.3d 674, at note 10 (4th Cir. 2004) (referencing *White ex v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003) ("Absent any evidence of bad faith exclusion of the parents or refusal to listen to or consider the Whites' input, Ascension met IDEA requirements with respect to parental input.").

15. The right to provide meaningful input is simply not the right to dictate an outcome and obviously cannot be measured by such. *See, e.g., Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 656 (8th Cir. 1999) (where no "serious hamper[ing]" of parent's opportunity to participate in the formulation process, IDEA requirement of meaningful parental input satisfied notwithstanding that parent's desired program not selected); *Lachman v. Illinois St. Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988) ("[P]arents, no matter how well-motivated, do not have a right under [the IDEA] to compel a school district to provide a specific program or employ a specific

methodology in providing for the education of their handicapped child".).

16. Petitioners failed to show they had a right to relief under the IDEA.

17. Claims that Respondent deprived *Student* of a FAPE on substantive grounds were not proven by a preponderance of the evidence.

18. Claims that Respondent violated IDEA's procedural requirements were not proven by a preponderance of the evidence.

19. There was no evidence to show that were any procedural irregularities and, even if so, *Student*'s right to FAPE was not impeded.

20. There was no evidence to show that were any procedural irregularities and, even if so, *Student*'s parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to *Student* was not impeded.

21. There was no evidence to show that there were any procedural irregularities and, even if so, *Student* was not deprived of educational benefit.

DECISION

The undersigned Administrative Law Judge finds and holds that upon the facts and the law Petitioners have shown no right to relief and Respondent is entitled to a dismissal of the claim. Respondent's Motion to Dismiss is GRANTED. Therefore, the Undersigned finds that Respondent's IEP and placement of Petitioner *Student* was appropriate to address *Student*'s needs as to provide him with FAPE in the least restrictive educational environment. The Petitioners are not entitled to nor are they granted any other relief.

This the 28th day of February, 2012.

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The Honorable Selina M. Brooks
Administrative Law Judge

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE ADMINISTRATIVE COURT
COUNTY OF CABARRUS	11-EDC-09919
STUDENT, by and through his parents, *FATHER* and *MOTHER*, Petitioners, v. Cabarrus County Board of Education, Respondent.	**ORDER AMENDING FINAL DECISION**

Pursuant to 26 NCAC 3.0129, for the purpose of correcting a clerical error, IT IS HEREBY ORDERED that the above-captioned Decision, issued from this Office on February 28, 2012, is amended as follows:

NOTICE

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights.

Pursuant to the provisions of NORTH CAROLINA GENERAL STATUTES Chapter 150B, Article 4, any party wishing to appeal the final decision of the Administrative Law Judge may commence such appeal by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. The party seeking review must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Decision and Order. N.C. GEN. STAT. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Pursuant to N.C. GEN. STAT. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal.

In the alternative, any person aggrieved by the findings and decision of this Order of Dismissal may institute a civil action in the appropriate district court of the United States as provided in Title 20 of the United States Code, Chapter 33, Subchapter II, Section 1415 (20 USC 1415). Procedures and time frames regarding appeal into the appropriate United States district court are in accordance with the aforementioned Code cite and other applicable federal statutes and regulations. A copy of the filing with the federal district court should be sent to the Exceptional Children Division, North Carolina Department of Public Instruction, Raleigh, North Carolina so that the records of this case can be forwarded to the court.

IT IS SO ORDERED.

This the 1st day of March, 2012.

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The Honorable Selina M. Brooks
Administrative Law Judge